STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 10, 2004
v	No. 249415 Saginaw Circuit Court
ARMANDO BENAVIDEZ, Defendant-Appellant.	LC No. 02-022148-FC

Before: Bandstra, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of first-degree premeditated murder, MCL 750.316(1)(a), and carrying a dangerous weapon with unlawful intent, MCL 750.226. We affirm.

Defendant first argues that there was insufficient evidence regarding premeditation and deliberation to support his first-degree murder conviction. We disagree. We review claims of insufficient evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). When reviewing a challenge to the sufficiency of the evidence, we examine the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Kelly*, 231 Mich App 627, 641; 588 NW2d 480 (1998).

"In order to convict a defendant of first-degree murder, the prosecution must prove that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate." *Kelly, supra* at 642. "Premeditation and deliberation require sufficient time to allow the defendant to take a second look." *Id*. "The elements of premeditation and deliberation may be inferred from the circumstances surrounding the killing." *Id*. "Though not exclusive, factors that may be considered to establish premeditation include the following: (1) the previous relationship between the defendant and the victim; (2) the defendant's actions before and after the crime; and (3) the circumstances of the killing itself, including the weapon used and the location of the wounds inflicted." *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998). Additionally, defensive wounds suffered by a victim can be evidence of premeditation. *People v Johnson*, 460 Mich 720, 733; 597 NW2d 73 (1999).

Here, a finding of premeditation and deliberation was supported by the circumstances surrounding the killing. Although there was no evidence of a prior relationship between

defendant and the victim, premeditation and deliberation may be inferred from the other facts and circumstances surrounding the incident. Defendant's sister and the victim were involved in an altercation. Upon learning this, defendant and five others returned to the scene of the incident. On the way, defendant was twirling a fold-out knife with a five-inch blade in his hand, and stated that he was going to "f--- [the victim] up." Upon arriving at the scene, defendant got out of the car, opened the knife, and chased the victim. The victim tripped on a wading pool and defendant jumped on top of him, stabbing him twice in the back. The victim rolled over and tried to defend himself, but defendant inflicted five additional stab wounds, causing the victim to bleed to death. Afterwards, defendant acknowledged killing the victim, and threatened "to kill everybody if they say anything about the stabbing." Viewing the evidence in a light most favorable to the prosecution, we conclude that there was sufficient evidence for a reasonable jury to find that defendant acted with the requisite premeditation and deliberation.

Defendant next argues that the trial court erred by failing to grant his request for a voluntary manslaughter instruction. We disagree. We review claims of instructional error de novo. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). However, our Supreme Court has held that harmless error analysis is applicable to instructional errors involving necessarily included lesser offenses. *People v Cornell*, 466 Mich 335, 361; 646 NW2d 127 (2002). Voluntary manslaughter is a necessarily included lesser offense of murder. *People v Mendoza*, 468 Mich 527, 541, 544; 664 NW2d 685 (2003). Therefore, "an instruction is warranted when a rational view of the evidence would support it." *Id*. at 548.

"[T]o show voluntary manslaughter, one must show that the defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions." *Mendoza*, *supra* at 535. "[T]he element distinguishing murder from manslaughter – malice – is negated by the presence of provocation and heat of passion." *Id*. at 540. Moreover, "[t]he provocation must be adequate, namely, that which would cause [a] reasonable person to lose control." *People v Pouncey*, 437 Mich 382, 389; 471 NW2d 346 (1991). Here, a rational view of the evidence did not support an instruction on voluntary manslaughter. Defendant did not know the victim, and had never come into contact with him before the incident. Instead, after finding out that his sister had been involved in an altercation with the victim, defendant returned to the scene of the altercation with a knife within five to ten minutes, chased the victim down, and stabbed him several times. There was no evidence that defendant was provoked by the victim in any way, such that would cause a reasonable person to lose control. Therefore, an instruction on voluntary manslaughter was not supported by the evidence, and the trial court did not err in declining to instruct the jury on that offense.[1]

[1] Additionally, we note that "where a defendant is convicted of first-degree murder, and the jury rejects other lesser included offenses, the failure to instruct on voluntary manslaughter is harmless." *People v Sullivan*, 231 Mich App 510, 520; 586 NW2d 578 (1998). Here, the jury rejected a verdict of second-degree murder; therefore, any error in failing to instruct the jury on voluntary manslaughter would be considered harmless in any event.

Finally, defendant argues that the trial court abused its discretion when it denied his motion for a mistrial based on the prosecutor's allegedly improper comment on his right to remain silent. The dialogue of which defendant complains stems from questions posed by the prosecutor to a detective regarding statements volunteered by defendant after being read his *Miranda*[2] rights. We review the grant or denial of a motion for mistrial for an abuse of discretion. *People v Manning*, 434 Mich 1, 7; 450 NW2d 534 (1990). An abuse of discretion exists only where denial of the motion deprived the defendant of a fair and impartial trial. *Id*. Additionally, we review properly preserved claims of prosecutorial misconduct de novo, examining the pertinent portion of the record and evaluating a prosecutor's remarks in context to determine whether the defendant was denied a fair and impartial trial. *People v Abraham*, 256 Mich App 265, 272-273; 662 NW2d 836 (2003).

It is well settled that when a defendant exercises his right to remain silent, that silence may not be used against him at trial. *People v Avant*, 235 Mich App 499, 509; 597 NW2d 864 (1999). However, in the instant case, defendant did not exercise his right to remain silent after being advised of his *Miranda* rights. Rather, after being advised of his right to remain silent, and without being asked any questions, defendant voluntarily stated that he was only in custody because he went into a gas station, that he was not familiar with the city where the crime occurred, and that if the police "had anything" on him, he would not be sitting in the police department. The prosecutor elicited testimony to that effect from the detective, and defense counsel moved for a mistrial on the basis that the prosecutor improperly commented on defendant's silence. The prosecutor responded that his questions and the detective's answers were not improper, because defendant voluntarily made the statements after being advised of his right to remain silent. Accordingly, the trial court denied defendant's motion for a mistrial.

We conclude that the prosecutor's questions and the detective's answers were not improper comments on defendant's right to remain silent. The prosecutor's questions did not address defendant's silence or any failure to make a statement. Defendant chose to speak, and the prosecutor inquired as to defendant's statements to the police to highlight the discrepancy between what defendant initially told the police and the defense theory of the case put forward at trial. "Where a defendant makes statements to the police after being given *Miranda* warnings, the defendant has not remained silent, and the prosecutor may properly question and comment with regard to the defendant's failure to assert a defense subsequently claimed at trial." *Avant*, *supra* at 509. Moreover, the trial court did not abuse its discretion in denying defendant's motion for a mistrial on this basis.

We affirm.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).